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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1955.

No. _____

Mary and George H. Brasier, - - - - *Petitioners,*

vs.

United States of America; T. Coleman Andrews, Internal Revenue Commissioner, Washington, D. C.; Earl R. Wiseman, District Director Internal Revenue, Oklahoma City, Oklahoma; and Charles M. Blackard, Internal Revenue Agent, Tulsa, Oklahoma, *Respondents.*

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The herein petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this controversy on December 28, 1955.

Opinion Below.

The judgment of the District Court was entered in this controversy on January 17, 1955 (R. 17-18). The Opinion of the Court of Appeals (App. B).

Jurisdiction.

The judgment of the Court of Appeals was entered on December 28, 1955, a petition for rehearing was duly filed and order denying same was issued on January 16, 1956, and mandate issued on January 30, 1956. The Jurisdiction of this Court is invoked under 28 U. S. C. 1254, pursuant to

Article III, Section 2 of the Constitution of the United States.

Questions Presented.

1. Whether petitioners' complaint, on its face, showed extraordinary or unusual situations warranting the intervention of a court of equity, and if so, did the appellate Court err in sustaining the judgment of the District Court in dismissing the complaint as to each and all or any of the defendants therein?

2. Whether the District Court had jurisdiction to entertain petitioners' motion to amend and supplement their complaint, and if so, did the court abuse its discretion in overruling said motion?

Constitutional Provisions, Treaty, Statutes and Internal Revenue Ruling Involved.

The pertinent provisions under this heading, involved herein, are set forth in Appendix A.

Statement.

The petitioner herein concerned, Mary Brasier, is a restricted member of the Osage Tribe of Indians and a Ward of the United States, receiving her allotments, in trust, under the Osage Allotment Act of June 28, 1906 (34 Stat. 539), and by inheritance of the allotment of other members of the Osage Tribe. That all the lands allotted under the Act were purchased by the United States from the Cherokee Nation in 1883 with funds held in trust for the Osage Tribe, pursuant to the Treaty of September 29, 1865 (14 Stat. 687), and the title thereto taken in the name of the United States in trust for the use and benefit of the Osages. Each member of the tribe, appearing on the roll provided for in the Act,

made the homestead allotment and the remainder of the lands so divided between them inalienable for a period of 25 years—now extended to January 1, 1984, by the Act of June 24, 1938 (52 Stat. 1034, C. 645), unless the allottee procured from the Secretary of the Interior a certificate of competency which would authorize the allottee to sell and convey all of the allotted lands except the homestead. The certificate of competency would also immediately render the lands (except the homestead) subject to (ad valorem) taxation, and in any event the land allotments with the exception of the homestead were to become taxable (for ad valorem taxes) on the expiration of three years from the approval of the Act. (R. 3)

The oil, gas, coal and other minerals covered by the allotted lands were reserved by the Act to the use of the tribe for a period of 25 years—now extended to April 8, 1983 (52 Stat. 1034, C. 645)—thus segregating the mineral deposits from all the allotted lands for a term of years. The Allotment Act authorized the tribe, through its tribal council, and with the approval of the Secretary of the Interior, to grant leases for extraction of these minerals and provided that the royalties received therefrom should be placed in the Treasury of the United States to the credit of the members of the tribe and distributed to the individual members according to the tribal roll provided for in the Act, in the manner and at the same time that payments were made of interest on other moneys held in trust for the Osages by the United States, each member receiving his or her pro rata share. (R. 3-4)

On May 21 the Superintendent of the Osage Indian Agency notified the herein concerned petitioner, Mary Brasier, that Internal Revenue Ruling G. C. M. 26399 (1950-18-13415), promulgated by the Commissioner of Internal

Revenue, pursuant to what is now Section 7805 (b) 1954 revision of the Internal Revenue Code (App. A), held that the oil and gas royalties received by restricted members of the Osage Tribe are includible, for Federal income tax purposes, in the gross income of such members on and after January 1, 1951. Mary Brasier protested the payment of said taxes for the year 1951 to the Superintendent. However the tax was paid.

On March 13, 1953, Mary Brasier, with the approval of the Superintendent, filed a joint return for the year 1952 with a memorandum excluding the sum of $3,743.12, representing the amount of Osage royalty received for the year 1952, and alleging that said sum was exempt from Federal and State income taxes by reason of the *Mary Blackbird* litigation (*Choteau* v. *Commissioner*, 38 F. 2d 976, C. C. A. 10, 1930) and other reasons. (R. 4)

The herein petitioners, in their pleading before the District Court, alleged that the therein action arose under the Constitution, Treaties and Laws of the United States; that the therein defendants, Earl R. Wiseman, District Director of Internal Revenue, through his subordinate, Charles M. Blackard, local Internal Revenue Agent, pursuant to the promulgation of the Commissioner of Internal Revenue, T. Coleman Andrews, were threatening to cause a deficiency assessment to be made against them and demanding the signing of a waiver of deficiency in tax, and that they were immediately in danger of sustaining an injury to their property rights; that Internal Revenue Ruling, *supra*, was null and void and against their substantive rights guaranteed by the Federal Constitution by reason of the Treaties and Laws relating to the Osage Tribe of Indians and the Doctrine of *stare decisis*, *Mary Blackbird* litigation, *supra*. (R. 2)

The District Court, upon hearing the therein defendants' motion to dismiss, issued summary judgment in favor of defendants and against plaintiffs. (R. 17-18) On April 6, 1955, a notice of appeal and bond was filed (R. 20-21) and on May 16, 1955, a motion was filed and granted extending the time in which to file the appeal in the appellate court for the express purpose of eliminating the necessity of an appeal and consequently a motion was filed with the court at bar, for an order granting leave *instanter* to amend and supplement the complaint. The motion was overruled and subsequently the appeal was filed and docketed with the appellate court on July 5, 1955, and the supplemental record filed on July 7, 1955, pursuant to an order granted July 1, 1955 (R. 22-25). The appellate court affirmed the judgment of the District Court as per its opinion (App. B).

Petitioners allege further by affidavit (App. C): That on the 17th day of November, 1955, Earl R. Wiseman, District Director of Internal Revenue, a party defendant herein, served upon the herein petitioners, by registered mail a deficiency notice stating that a liability exists in the amount of $1,065.50 for the taxable year ended December 31, 1954; that said deficiency notice was served upon the herein petitioners, without justification, while this suit was and is still pending.

That the petitioners, while in the process of formulating the instant petition, have discovered that the Osage Indian Agency has been paying Federal income taxes out of the trust funds of the herein petitioner, Mary Brasier, pursuant to Internal Revenue Ruling G. C. M. 18242 (C. B. 1937-1, 57) which was predicated on the holding in *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418, without due process of law and in violation of the herein concerned petitioner's contractual rights pro-

tected by the Fifth Amendment to the Federal Constitution.

Reasons for Granting Writ.

1. The handling of this controversy by the courts below, involving vital points of Federal tax administration and the administration of Indian affairs, was so lacking in fair and judicial procedure and consideration as to require the exercise of the supervisory function of this Court, not only to correct the injustice wrought in this controversy but to prevent the recurrence of like injustice in similar controversies arising in the future.

2. The decision of the courts below are in direct, express conflict with applicable decisions of this Court and other circuits, where Indians are located.

3. The determination of the lower courts are clearly erroneous, and without one scintilla of legal authority to sustain their holdings.

ARGUMENT.

The petitioner herein concerned, Mary Brasier, a non-competent allotted Osage Indian—ward of the United States, stands alone, in lieu of her Treaty and Statutory Protector,[1] and utterly forsaken in her distinguished efforts to invoke equity interposition to enforce the recognition of, and to restrain the threatened injury that would be sustained by the fraudulent and illegal seizure of her contractual rights and property, by the United States, in the collection of Federal income taxes in contravention of the Constitution of the United States, in violation of the Treaty of September 29, 1865 (14 Stat. 687), affirmed by the General Statutory Act of March 3, 1871 (16 Stat. 544, 566, R. S. Sec. 2079); the Osage Allotment Act of June 28, 1906 (34 Stat. 539), *et seq.*, individualizing Osage Tribal rights; and the doctrine of *stare decisis* (*Mary Blackbird in Choteau v. Commissioner*, 38 F. 2d 976, (C. C. A. 10, 1930)) supported by 14 United States Supreme Court decisions and 3 United States Attorney General Opinions. Raising novel, unique, extraordinary and important constitutional, treaty, statutory and equity questions upon the very face of petitioner's complaint, with the Obligation of Contract,[2] the Instrumentality Doctrine[3] and the Obligation of Trust[4] staring the

1. Treaty of September 29, 1865 (7 Stat. 107); 25 U. S. C., Section 175; United States v. Osage County, 251 U. S. 128, 64 L. ed. 184; Superintendent of Five Civilized Tribes v. Commissioner, 295 U. S. 418, 79 L. ed. 1517; Cohen, Handbook of Federal Indian Law, Chapter 12, Section 8, Chapter 13 and Chapter 19.

2. Treaty of September 29, 1865 (7 Stat. 107); Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941; Carpenter v. Shaw, 280 U. S. 363, 74 L. ed. 478.

3. United States v. Rickert, 188 U. S. 432, 47 L. ed. 532; Sweet v. Schock, 245 U. S. 192, 62 L. ed. 237.

4. United States v. Bowling, 256 U. S. 484, 65 L. ed. 1054.

appellate court in the eye. The court sanctioned dismissal for insufficiency upon its face, without hearing upon evidence, and decision with appropriate findings by the District Court.[5]

The appellate court, relative to jurisdiction in the instant controversy, cited *Jones* v. *Taunah*, 186 F. 2d 445, (C. C. A. 10, 1951) which is the only case that could possibly be in point, and that case was predicated, by the majority of the court, upon a misunderstanding of the law enunciated in *Choteau* v. *Burnet*, 285 U. S. 691; *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418, and *Landman* v. *Commissioner*, 123 F. 2d 787, which was later overruled by *Landman* v. *United States*, 71 F. Supp. 640, by reason of *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598; and notwithstanding the lucid opinion of Chief Justice PHILLIPS, dissenting in *Jones* v. *Taunah*, *supra*, which attracted the attention of the appellate court for the Ninth Circuit in *Squire* v. *Capoeman*, 220 F. 2d 349, and in its opinion agreed with the dissenting opinion of Chief Justice PHILLIPS, thereby causing a conflict between the circuits, leading to the present case now before this Court.[6] The other two cases cited by the appellate court in the instant controversy, relative to jurisdiction, are wholly "the citizens law" sometimes referred to as "the white-man's law." What we are concerned with here is "Indian law" which is in effect a unique, complex and separate law consisting of contractual and trusteeship relations between the United States and the allotted Indian ward, with the United States as trustee and protector, and the allotted In-

5. Borden's Farm Produce Co. v. Baldwin, 293 U. S. 194, 79 L. ed. 281.

6. Squire v. Copeman, No. 134, United States Supreme Court, October Term 1955, including briefs *amicus curiae*.

dian ward receiving his or her contractual considerations for lands ceded to the United States and other reasons.

This Court has always upheld the right to invoke the interposition of a court of equity, where Indian wards and their contractual rights were concerned, even with the advent of statutes precluding a suit to restrain the collection of taxes; where the United States has an interest; where the imposition of a tax would substantially impede or burden the functioning of the Federal Government in its dealings with the Indian tribe or individual allotted ward; where no remedy exists in law that could be efficacious for the protection of the complex rights in property for the attainment of those purposes; where only in a court of equity adequate relief could be procured, by comprehensive decree, giving security against a multiplicity of suits.[7]

Under Rule 60 of the Federal Rules of Civil Procedure affording relief from judgment in the interest of equitable justice during the pendency of an appeal, it is contended that the only place jurisdiction could lie is in the District Court until the appeal has been filed and docketed in the appellate court, and thereafter while the appeal is pending in the appellate court, the district court may make corrections with leave of the appellate court. The proposition that the District Court is without jurisdiction after a final judgment has been entered by summary action is patently fallacious for it would coerce the party seeking relief in that court to file and docket the record in the appellate court to gain jurisdiction that is still within the jurisdiction of the District Court.[8] The District Court in overruling a motion to amend

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7. United States v. Rickert, 188 U. S. 432, 47 L. ed. 532; United States v. Osage County, 251 U. S. 128, 64 L. ed. 184; Cohen, Handbook of Federal Indian Law, Chapters 13 and 19.

8. Cherokee Nation v. Whitmire, 223 U. S. 109, 56 L. ed. 370.

and supplement in the interest of equitable justice, would not only be an abuse of discretion, but would place an arbitrary and unreasonable burden upon the moving party, and defeat the principles set forth in Rule 15.[9]

It is the contention of the herein petitioners that the Tucker Act (28 U. S. C. 1346) gives jurisdiction in civil actions upon any express or implied contract with the United States, and this action is an action upon contractual relations with the United States, and the United States was made a party by reason of this Code and to recover taxes illegally assessed and collected for the year ended December, 1951. (R. 9, 11, 22)

The Commissioner of Internal Revenue was made a party to this action because he was functioning here in this jurisdiction through his agents.[10]

Conclusion.

There is a conflict of decisions on a matter of continuing importance which should be resolved by this Court. The petition for writ of certiorari should be granted.

Respectfully submitted,

GEORGE H. BRASIER,
Pro Se for Petitioners.

March, 1956.

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9. Hardin v. Boyd, 113 U. S. 756, 28 L. ed. 1141.

10. 28 U. S. C. 1346; Brougham v. Blanton Mfg. Co., 243 Fed. 503.

Appendix A.

CONSTITUTIONAL PROVISIONS.

Article I, Section 2, Clause 3:

"and excluding Indians not taxed"

Article I, Section 7, Clause 1:

"All Bills for raising Revenue shall originate in the House of Representatives."

Article 1, Section 8:

"The Congress shall have Power to lay and collect Taxes."

Article III, Section 2:

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made."

Article VI, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land."

Amendment 5:

"No person shall * * * be deprived of property, without due process of law."

Amendment 14, Section 2:

"excluding Indians not taxed."

Amendment 16:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

TREATY OF THE UNITED STATES WITH THE OSAGE.

Articles of treaty and convention, made and concluded at Canville Trading Post, Osage Nation, within the boundary of the State of Kansas, on the twenty-ninth day of September, eighteen hundred and sixty-five, by and between D. N. Cooley, Commissioner of Indian Affairs, and Elijah Sells, superintendent of Indian Affairs for the southern superintendency, commissioners on the part of the United States, and the chiefs of the tribe of Great and Little Osage Indians, the said chiefs being duly authorized to negotiate and treat by said *tribes*.

ARTICLE 1. The tribe of the Great and Little Osage Indians, having now more lands than are necessary for their occupation, and all payments from the Government to them under former treaties having ceased, leaving them greatly impoverished, and being desirous of improving their condition by disposing of their surplus lands, do hereby grant and sell to the United States the lands contained within the following boundaries, that is to say: Beginning at the southeast corner of their present reservation, and running thence north with the eastern boundary thereof fifty miles; thence west with the northern line thirty miles; thence south fifty miles, to the southern boundary of said reservation; and thence east with said southern boundary to the place of beginning: Provided, That the western boundary of said land herein ceded shall not extend farther westward than upon a line commencing at a point on the southern boundary of said Osage country one mile east of the place where the Verdigris River crosses the southern boundary of the State of Kansas. And, in consideration of the grant and sale to them of the above-described lands, the United States agree to pay the sum of three hundred thousand dollars, which sum shall be placed to the credit of said tribe of Indians in the Treasury of the United States, and interest thereon at the rate of five per centum per annum shall be paid to said tribes semi-annually, in money, clothing, provisions, or

such articles of utility as the Secretary of the Interior may, from time to time, direct. Said lands shall be surveyed and sold, under the direction of the Secretary of the Interior on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands; but no preemption claim or homestead settlement shall be recognized; and after re-imbursing the United States the cost of said survey and sale, and the sum of three hundred thousand dollars placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the Treasury of the United States to the credit of the "civilization fund," to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States.

ARTICLE 2. The said tribe of Indians also hereby cede to the United States a tract of land twenty miles in width from north to south, off the north side of the remainder of their present reservation, and extending its entire length from east to west; which land is to be held in trust for said Indians, and to be surveyed and sold for their benefit under the direction of the Commissioner of the General Land Office, at a price not less than one dollar and twenty-five cents per acre, as other lands are surveyed and sold, under such rules and regulations as the Secretary of the Interior shall from time to time prescribe. The proceeds of such sales, as they accrue, after deducting all expenses incident to the proper execution of the trust, shall be placed in the Treasury of the United States to the credit of said tribe of Indians; and the interest thereon, at the rate of five per centum per annum, shall be expended annually for building houses, purchasing agriculture implements and stock animals, and for the employment of a physician and mechanics, and for providing such other necessary aid as will enable said Indians to commence agricultural pursuits under favorable circumstances: Provided, That twenty-five per centum of the net proceeds arising from the sale of said trust lands,

until said percentage shall amount to the sum of eighty thousand dollars, shall be placed to the credit of the school fund of said Indians; and the interest thereon, at the rate of five per centum per annum, shall be expended semi-annually for the boarding, clothing, and education of the children of said tribe.

ARTICLE 10. The Osages acknowledge their dependence on the Government of the United States, and invoke its protection and care; they desire peace, and promise to abstain from war, and commit no depredations on either citizens or Indians; and they further agree to use their best efforts to suppress the introduction and use of ardent spirits in their country.

ARTICLE 12. Within six months after the ratification of this treaty the Osage Indians shall remove from the lands sold and ceded in trust, and settle upon their diminished reservation.

ARTICLE 16. It is also agreed by said contracting parties, that if said Indians shall agree to remove from the State of Kansas, and settle on lands to be provided for them by the United States in the Indian Territory on such terms as may be agreed on between the United States and the Indian tribes now residing in said Territory or any of them, then the diminished reservation shall be disposed of by the United States in the same manner and for the same purposes as hereinbefore provided in relation to said trust lands, except that 50 per cent of the proceeds of the sale of said diminished reserve may be used by the United States in the purchase of lands for a suitable home for said Indians in said Indian Territory.

STATUTES.

Act of March 3, 1871 (16 Stat. 544; Rev. Stat., Sec. 2079):

That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with

whom the United States may contract by treaty; provided further, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with such nation or tribe.

Act of June 5, 1872 (17 Stat. 228):

CHAP. 310. *An* Act to confirm to the Great and Little Osage Indians a reservation in Indian *Territory*.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress *assembled*, That in order to provide said Osage tribe of Indians with a reservation, and secure to them a sufficient quantity of land suitable for cultivation, the following described tract of country, west of the established ninety-sixth meridian, in the Indian Territory, be, and the same is hereby, set apart for and confirmed as their reservation, namely: Bounded on the east by the ninety-sixth meridian, on the south and west by the north line of the Creek country and the main channel of the Arkansas River, and on the north by the south line of the State of Kansas: Provided, That the location as aforesaid shall be made under the provisions of article sixteen of the treaty of eighteen hundred and sixty-six, so far as the same may be applicable thereto.

Act of June 28, 1906 (34 Stat. 539):

An Act for the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes.

SEC. 2. That all lands belonging to the Osage tribe of Indians in Oklahoma Territory, except as herein provided, shall be divided among the members of said tribe, giving to each his or her share thereof in acres, as follows:

Fourth. * * * Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided by Act

of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided.

Seventh. That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, which shall remain inalienable and non-taxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs: Provided, That upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States: Provided, That the surplus lands shall be non-taxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress: And provided further, That nothing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe as hereinafter provided: And provided further, That the oil, gas, coal and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Acts of Congress.

Twelfth, paragraph 2. That the provisions of an Act entitled "An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the

fiscal year ending June thirtieth, nineteen hundred and six, and for other purposes," approved March third, nineteen hundred and five, relating to the Osage Reservation, pages one thousand and sixty-one and one thousand and sixty-two, volume thirty-three, United States at Large, be, and the same are hereby, continued in full force and effect.

SEC. 5. That at the expiration of the period of twenty-five years from and after the first day of January, nineteen hundred and seven, the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the individual members of the Osage tribe, according to the roll herein provided for, or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys, and mineral interest, except as herein provided.

SEC. 7. That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or their heirs, as herein provided; and said members, or their heirs, shall have the right to use and lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of same, including the proceeds thereof; • • •

Act April 18, 1912 (37 Stat. L. 86):

CHAP. 83. *An* Act supplementary to and amendatory of the act entitled "An Act for the division of the lands and funds of the Osage Nation of Indians in Oklahoma," approved June twenty-eight, nineteen hundred and six, and for other *purposes.*

SEC. 9. The word "competent," as used in this act, shall mean a person to whom a certificate has been issued authorizing alienation of all the lands comprising his allotment, except his homestead.

Act March 3, 1921 (41 Stat. L. 1249):

CHAP. 120. *An* Act to amend section 3 of the Act of Congress of June 28, 1906, entitled, "An Act for the division of the lands and funds of the Osage Indians in Oklahoma, and for other *purposes.*"

SEC. 3. That all members of the Osage Tribe of Indians are hereby declared to be citizens of the United States, but this shall not effect their interest in tribal property or the control of the United States over such property as is now or may hereafter be provided by law, • • •

Act May 19, 1937 (50 Stat. 188, C. 227, Amending 49 Stat. 1542):

An Act amending Section 2 of Public Law Numbered 716 of the Seventy-fourth Congress, being an Act entitled "An Act to relieve restricted Indians whose lands have been lost by failure to pay taxes, and for other *purposes.*"

Be it enacted by the Senate and House of Representatives of the United States of America in Congress *assembled.* That Section 2 of Public Law Numbered 716 of the Seventy-fourth Congress, being an Act entitled "An Act to relieve restricted Indians whose lands have been taxed or have been lost by failure to pay taxes, and for other purposes," is hereby amended to read as follows:

SEC. 2. All homesteads, heretofore purchased out of trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be non-taxable until otherwise directed by Congress; Provided, That the title to such homesteads shall be subject to restrictions against alienation or encumbrance except with approval of the Secretary of the Interior.

Joint Resolution April 25, 1940 (Public Resolution—No. 66 —76 Congress, Chapter 158—3rd Session, H. J. Res. 289).

Joint Resolution to amend Section 5 of Public Law Numbered 360 Sixty-sixth *Congress.*

Resolved by the Senate and House of Representatives of the United States of America in Congress *assembled,* That Section 5 of the Osage Act (S. 4039, Public, Numbered 360, Sixty-sixth Congress; 41 Stat. 1249) be amended to read as follows:

Sec 5. That the State of Oklahoma is authorized from and after the passage of this Act to levy and collect a gross-production tax, not to exceed the existing rate, upon all oil and gas production in Osage County, Oklahoma, except as herein otherwise provided, and all taxes so collected shall be paid and distributed, and shall be in lieu of all other State and County taxes levied upon the production of oil and gas as provided by the laws of Oklahoma. The gross production tax on the royalty interests of the Osage Indians shall be at the rate levied by said State but in no event to exceed 5 per centum and said tax shall be paid by the Secretary of the Interior, through the proper officers of the Osage Agency, to the State of Oklahoma, from the amount received by the Osage Indians from the production of oil and gas to be distributed in like manner as gross production tax under the laws of said State, and the Secretary shall pay the tax herein authorized upon the condition and not otherwise that an additional one-fifth of said sum or sums paid by the Secretary in pursuance of this Act shall be delivered over to Osage County, Oklahoma at the same time or times as other payment or payments herein provided for are made to said county, one-half thereof to be apportioned to a fund to be used by said county only for the construction and maintenance of roads and bridges therein, the other one-half thereof to be used for the maintenance of common schools of said county as provided by law.

28 U. S. C. 1346:

Section 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws, (i) if the claim does not exceed $10,000 or (ii) even if the claim exceeds $10,000 if the collector of internal revenue by whom such tax, penalty or sum was collected is dead or is not in office as collector of internal revenue when such action is commenced;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(b) Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim, or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of:

(1) Any civil action or claim for a pension;

(2) Any civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States.

As amended Apr. 25, 1949, c. 92, Sec. 2(a), 63 Stat. 62; May 24, 1949, c. 139, Sec. 80(a, b), 63 Stat. 101; Oct. 31, 1951, c. 655, Sec. 50(b) 65 Stat. 727.

7805 (b) Internal Revenue Code 1954:

(6) Retroactivity of Regulation or Rulings.—The Secretary or his delegates may prescribe the extent if any, to which any ruling or regulation, relating to the Internal Revenue laws, shall be applied without retroactive effect.

FEDERAL RULES OF CIVIL PROCEDURE.

Rule 15.

Amended and Supplemental Pleadings.

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days

after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendmeints. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

Rule 60.

Relief From Judgment or Order.

(a) Clerical Mistakes. Clerical mistakes in judgments orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court. As amended Dec. 27, 1946, eff. March 19, 1948.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., Sec.

1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946; Dec. 29, 1948, eff. Oct. 20, 1949.

RULES OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Rule 15, Par. 6:

A flat fee of $25 will be required of appellant before the record in a case is filed and the case is docketed.

INTERNAL REVENUE RULING.

Income Tax.—Part 1

INTERNAL REVENUE CODE.

Section 22(a).—Gross Income: General Definition.

Section 29.22 (a)-1: What included in gross income. 1950-18-13415 G. C. M. 26399

INTERNAL REVENUE CODE AND PRIOR REVENUE LAWS.

Oil and gas royalties received by restricted members of the Osage Tribe of Indians from the mineral leases of the tribe are includible, for Federal income tax purposes, in the gross income of such members.

G. C. M. 18242 (C. B. 1937-1, 57) modified.

Reconsideration has been given to G. C. M. 18242 (C. B. 1937-1, 57) in the light of the decision in *Commissioner* v. *Sunnen* (333 U. S. 591; Ct. D. 1698, C. B. 1948-1, 7).

In G. C. M. 16100 (C. B. XV-1, 80 (1936)) it was held among other things, that the income of restricted members

of the Osage Tribe of Indians from rents, royalties, and bonuses derived from the mineral leases of the tribe is subject to Federal income tax . That holding was predicated on the decision of the Supreme Court of the United States in *Superintendent of Five Civilized Tribes* v. *Commissioner* (295 U. S. 418, Ct. D. 974, C. B. XIV-1, 158 (1935)).

G. C. M. 18242, *supra,* revoked G. C. M. 16100, *supra,* to the extent of the above stated holding. Although not so stated in G. C. M. 18242, that partial revocation was based on the conclusion that the Government was estopped by the judgment in *Blackbird* v. *Commissioner* (38 F. 2d 976) from holding that the above-mentioned income was taxable. However, in the *Sunnen* case, *supra,* the Court stated:

But collateral estoppel is a doctrine capable of being applied so as to avoid an undue disparity in the impact of income tax liability. A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion. (Compare *United States* v. *Stone & Downer Co.,* 274 U. S. 225, 235-236.) Such consequences, however, are neither necessitated nor justified by the principle of collateral estoppel. That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.

The Court held in effect that the doctrine of collateral estoppel has no application when a subsequent decision of a court of last resort has effected a change in the applicable legal principles. Therefore, the doctrine of collateral estoppel or estoppel by judgment has no application in determining the taxable status of oil and gas royalty income of the Osage Tribe of Indians.

Accordingly, it is the opinion of this office that oil and gas royalties received by restricted members of the Osage Tribe of Indians from the mineral leases of the tribe are includible, for Federal income tax purposes, in the gross income of such members. G. C. M. 18242, *supra*, is modified to conform to this opinion.

Pursuant to authority contained in Section 3791 (b) of the Internal Revenue Code, the instant ruling is limited in its application to oil and gas royalties received by restricted members of the Osage Tribe of Indians on and after January 1, 1950.

Charles Oliphant,
Chief Counsel, Bureau of Internal Revenue.

Approved June 5, 1950. Fred S. Martin, Acting Commissioner of Internal Revenue.

Approved August 1, 1950. Thomas J. Lynch.

Appendix B.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT.

November Term, 1955.

Filed United States Court of Appeals, Tenth Circuit, Dec. 28, 1955. Robert B. Cartwright, Clerk.

Number 5186.

Mary and George Brasier, Appellants,

vs.

United States of America; T. Coleman Andrews, Internal

Revenue Commissioner; Earl R. Wiseman, District Director Internal Revenue, Oklahoma City, Oklahoma; and Charles M. Blackard, Internal Revenue Agent, Tulsa, Oklahoma, Appellees.

Appeal from the United States District Court for the Northern District of Oklahoma.

George H. Brasier, *pro se* for appellants.

Stanley P. Wagman (H. Brian Holland, Ellis N. Slack, Hilbert P. Zarky, Joseph F. Goetten, B. Hayden Crawford and Robert S. Rizley were with him on the brief) for Appellees.

before Murrah and Pickett, Circuit Judges, and Rice, District Judge.

PER CURIAM: This is an appeal from an order of the District Court for the Northern District of Oklahoma, dismissing appellants' action to restrain the United States of America, the Commissioner of Internal Revenue, the District Director of Internal Revenue, Oklahoma City, Oklahoma, and a local internal revenue agent at Tulsa, Oklahoma from assessing income tax on the appellant, Mary Brasier's, pro rata share of income from oil and gas royalty of the restricted members of the Osage Indian Tribe for the taxable year 1952. The contention is that such income is not taxable to Mary Brasier because of her status as a restricted Osage Indian.

Quite apart from the court's lack of jurisdiction of the United States and of the Commissioner, see *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682; *United States* v. *Sherwood*, 312 U. S. 584; *Caledonian Coal Co.* v. *Baker*, 196 U. S. 432, 444, this action to enjoin the collection of income taxes is prohibited by Section 3653, Title 26 U. S. C., in the absence of extraordinary or unusual situations warranting the intervention of a court of equity. And, neither the validity nor the constitutionality of the tax sought to be collected constitute extraordinary circumstances within

the meaning of the rule. See *Voss* v. *Hinds*, 208 F. 2d 911; *Jones* v. *Taunah*, 186 F. 2d 445; *Sturgeon* v. *Schuster*, 151 F. 2d 811.

Appellants also complain of the refusal of the court to allow an amendment to the pleadings after the appeal had been lodged, but the filing of the appeal deprived the trial court of jurisdiction to allow amendments to the pleadings, and the court therefore did not err in its refusal to do so. See *Willoughby* v. *Sinclair Oil & Gas Co.*, 188 F. 2d 902.

The judgment is affirmed.

JUDGMENT.

Twenty-eighth Day, November Term, Wednesday December 28th, 1955.

Before Honorable Alfred P. Murrah and Honorable John C. Pickett, Circuit Judges, and Honorable Eugene Rice, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Appendix C.

AFFIDAVIT.

State of Oklahoma, County of Tulsa—ss:

Mary Brasier and George H. Brasier, who, being duly sworn, makes oath and say that they are the petitioners herein and make this affidavit a part of the herein cause by reference; that on the 17 day of November, 1955, Earl R. Wiseman, District Director of Internal Revenue, a party defendant herein, served upon the herein petitioners, by

registered mail a deficiency notice stating that a liability exists in the amount of $1,065.50 for the taxable year ended December 31, 1954; that said deficiency notice was served upon the herein petitioners, without justification, while this suit was and is still pendng.

That the petitioners, while in the process of formulating the instant petition, have discovered that the Osage Indian Agency has been paying Federal income taxes out of the trust funds of the herein concerned petitioner, Mary Brasier, pursuant to Internal Revenue Ruling G. C. M. 18242 (C. B. 1937-1, 57), which was predicated on the holding in *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418, without benefit of due process of law, and in violation of the herein concerned petitioners' contractual rights protected by the Fifth Amendment to the Federal Constitution.

....., Mary Brasier,

....., George H. Brasier.

Subscribed and sworn to before me this ... day of March, 1956.

....., Notary Public.

My Commission expires .....

CERTIFICATE OF SERVICE.

I do hereby certify that copies of the foregoing Petit[ion] have been mailed to the following:

Mr. B. Hayden Crawford, United States Attorney, F[ed]eral Building, Tulsa Oklahoma, Mr. H. Brian Holland, A[s]sistant Attorney General, Simon E. Sobeloff, Solicitor G[en]eral, Department of Justice, Washington 25, D. C., and R[us]sell C. Harrington, Commissioner of Internal Reve[nue] Washington, D. C.

....., George H. Brasier.

March 21, 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 796

MARY AND GEORGE H. BRASIER, PETITIONERS

v.

UNITED STATES OF AMERICA; T. COLEMAN ANDREWS, INTERNAL REVENUE COMMISSIONER; EARL R. WISEMAN, DISTRICT DIRECTOR INTERNAL REVENUE; AND CHARLES M. BLACKARD, INTERNAL REVENUE AGENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Pet. 26–28) is reported at 229 F. 2d 176.

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1955. (Pet. 28.) A petition for rehearing filed by the taxpayers was denied on January 16, 1956. The petition for

a writ of certiorari was filed on March 26, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether maintenance of a suit to restrain collection of Federal income tax is precluded by Section 7421 (a) of the Internal Revenue Code of 1954.

2. Whether the District Court lacked jurisdiction to entertain taxpayers' motion to amend their complaint when taxpayers had previously filed a notice of appeal from the judgment dismissing that complaint.[1]

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 6212. NOTICE OF DEFICIENCY.

(a) *In General.*—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send

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[1] On May 16, 1955, some 40 days after taxpayers had filed a notice of appeal from the judgment of the District Court dismissing their suit to enjoin collection of their income tax for the year 1952, they filed a motion in the District Court for leave to amend their complaint to seek a refund of income tax for the year 1951. (R. 20, 22.) The motion was denied on the same day (R. 25), and, although it does not appear that any subsequent notice of appeal was filed, the propriety of the District Court's denial of that motion was treated as an issue properly before the Court of Appeals.

notice of such deficiency to the taxpayer by registered mail.

* * * * *

(c) *Further Deficiency Letters Restricted.*—

(1) *General Rule.*—If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213 (a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar year, or of estate tax in respect of the taxable estate of the same decedent, except in the case of fraud, and except as provided in section 6214 (a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213 (b) (1) (relating to mathematical errors), or in section 6861 (c) (relating to the making of jeopardy assessments).

* * * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 6212.)

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES: PETITION TO TAX COURT.

(a) *Time for Filing Petition and Restriction on Assessment.*—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is

mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421 (a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 6213.)

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212 (a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 7421.)

STATEMENT

On October 14, 1954, George H. Brasier, acting on his own behalf and as attorney in fact for his wife, Mary Brasier, filed a complaint in the United States District Court for the Northern District of Oklahoma, naming as defendants the United States of America; T. Coleman Andrews, Internal Revenue Commissioner, Washington, D. C.; Earl R. Wiseman, District Director of Internal Revenue, Oklahoma City, Oklahoma; and Charles M. Blackard, Internal Revenue Agent, Tulsa, Oklahoma, The complaint alleged that Mary Brasier was a restricted member of the Osage Tribe of Indians and a ward of the United States; that, for the year 1951, the Superintendent of the Osage Agency, Pawhuska, Oklahoma, had, on her behalf and over her protest to him, paid the federal income tax on oil and gas royalties which she received from mineral leases of the Tribe; that, for the year 1952, George and Mary Brasier had filed a joint return with a memorandum excluding Osage royalties received by Mary Brasier and alleging that such royalties were exempt from taxation; and that the defendants were demanding that the Brasiers sign a waiver of restrictions on assessment and collection of a tax deficiency and were threatening to cause a deficiency assessment to be made. The complaint prayed that the defendants be enjoined from the collection of the tax and for such other

relief as the court might deem necessary and proper. (R. 2–5.)

On December 9, 1954, the United States Attorney for the Northern District of Oklahoma filed motions to dismiss on behalf of the various defendants. The grounds urged were that the United States had not consented to be sued in an action to enjoin the collection of taxes; that T. Coleman Andrews, Commissioner of Internal Revenue, was not within the jurisdiction of the court and had not been served with process in such jurisdiction; that maintenance of the action to restrain collection of taxes was prohibited by Section 7421 (a) of the Internal Revenue Code of 1954; that it appeared on the face of the complaint that the plaintiffs had an adequate remedy at law; and that the action appeared on the face of the complaint to be premature since there was no threat of imminent injury to the plaintiffs. (R. 7–8.)

On January 17, 1955, the District Court entered a judgment dismissing the complaint. (R. 17–18.) On January 24, 1955, a petition for rehearing was filed on behalf of taxpayers. (R. 18–20.) On February 11, 1955, the District Court entered an order denying the petition for a rehearing. (R. 20.) On April 6, 1955, a notice of appeal was filed on behalf of taxpayers. (R. 20–21.) On May 16, 1955, a motion for leave to amend the complaint

to seek a refund of federal income tax for the year 1951 was filed and, after hearing, denied by the District Court. (R. 22–25.) On July 1, 1955, the District Court entered an order granting taxpayers' motion to have the proceedings in connection with the motion to amend the complaint made a part of the record on appeal. (R. 25.)

On December 28, 1955, the Court of Appeals affirmed the judgment of the District Court. (Pet. 26–28.)

ARGUMENT

Contrary to petitioners' suggestions (Pet. 8, 10), this case does not present any question of "Indian law" or involve any conflict of decisions. Rather, it involves two simple questions—(1) whether the District Court had jurisdiction to entertain taxpayers' suit to enjoin collection of their federal income tax, and (2) whether the District Court had jurisdiction to allow petitioners to amend their complaint after they had filed a notice of appeal from the judgment dismissing that complaint. Each of these jurisdictional questions was decided by the courts below in accordance with well-settled principles and neither question warrants further review.

1. It is well established that the provisions of Section 7421 (a) of the Internal Revenue Code of 1954, *supra*, p. 4 (formerly Section 3653 (a) of the

Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Sec. 3653)), prohibit the maintenance of taxpayers' suits to enjoin collection of their income taxes in the absence of extraordinary or unusual circumstances, and that the alleged invalidity and unconstitutionality of the taxes sought to be collected do not constitute such extraordinary or unusual circumstances. See *Burke* v. *Mingori*, 128 F. 2d 996 (C. A. 10th), certiorari denied, 317 U. S. 662; *Sturgeon* v. *Schuster*, 158 F. 2d 811 (C. A. 10th), certiorari denied, 331 U. S. 817; *Voss* v. *Hinds*, 208 F. 2d 912 (C. A. 10th).[2] If such taxpayers can seek a redetermination in the Tax Court before payment of any deficiencies determined in their income taxes or pay such taxes and sue for a refund, they are deemed to have an adequate remedy at law. *Sturgeon* v. *Schuster, supra.* Accordingly, in the instant case, petitioners' complaint seeking to enjoin collection of their income tax for the year 1952 was properly dismissed. Moreover, the District Court lacked jurisdiction to entertain such suit against the United States or the Commissioner of Internal Revenue since the United States has not consented to be so sued, and since the Commissioner was

[2] *United States* v. *Rickert*, 188 U. S. 432, and *United States* v. *Osage County*, 251 U. S. 128, upon which the taxpayers rely (Pet. 9), did not involve the statutory ban against taxpayers' suits to restrain collection of their income taxes but rather suits by the United States itself with respect to unlawful or arbitrary collection of local property taxes.

neither a resident of Oklahoma nor served with process within the territorial jurisdiction of the District Court. *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682; *Caledonian Coal Co.* v. *Baker*, 196 U. S. 432, 444.

2. Under 28 U. S. C., Section 2107, a judgment or order of a District Court is brought before a Court of Appeals for review only if notice of appeal is filed within the prescribed period after entry of such judgment or order. See also Rule 73 (a), Federal Rules of Civil Procedure. Since no notice of appeal appears to have been filed subsequent to the District Court's order denying petitioners' motion to amend their complaint, it seems highly doubtful that the propriety of the District Court's action in denying that motion was actually in issue on appeal. However, in considering the propriety of that action, we have assumed *arguendo* that it is proper to treat as a notice of appeal petitioners' motion to have the proceedings in connection with the motion to amend the complaint made a part of the record on appeal.

Under Rule 73 (a) of the Federal Rules of Civil Procedure, an appeal is perfected upon the filing of a notice of appeal; and, except for such matters as preparation and transmission of the record on appeal, perfection of an appeal deprives the District Court of jurisdiction over the cause.

See *Willoughby* v. *Sinclair Oil & Gas Co.*, 188 F. 2d 902, 904 (C. A. 10th); *Jordan* v. *Federal Farm Mortgage Corp.*, 152 F. 2d 642, 644 (C. A. 8th), petition for certiorari dismissed, 328 U. S. 821, certiorari denied, 328 U. S. 852; *Bergeron* v. *Mansour*, 152 F. 2d 27, 31 (C. A. 1st).[3] Accordingly, since petitioners' motion for leave to amend their complaint was filed in the District Court after their notice of appeal had been filed (R. 20-22), the District Court properly denied that motion.[4]

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[3] *Cherokee Nation* v. *Whitmire*, 223 U. S. 108, and *Hardin* v. *Boyd*, 113 U. S. 756, upon which petitioners rely (Pet. 9, 10), are not to the contrary. *Hardin* involved only an amendment of a pleading, where no appeal was pending, and in *Cherokee Nation* the application for appeal was, with the court's permission, withdrawn before a motion for new trial was filed.

[4] Moreover, dismissal of the complaint would appear to have been proper even if the motion to amend were considered as having been granted. Thus, under Section 7422 of the Internal Revenue Code of 1954 (formerly Section 3772 (a) (1) of the Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Sec. 3772)), the filing of a timely claim for refund or credit is made a prerequisite to the maintenance of a suit for refund or credit. The complaint (R. 2–5), even if considered as amended in accordance with the motion (R. 22), contains no allegation that the necessary refund claim for the year 1951 has been filed.

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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